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Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
c/o Natek, Inc.
236 Massachusetts Ave., NE - #110
Washington, DC 20002

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NOV 14 2005

Federal Communications Commission
Office of Secretary

Re: Initial Comments of SMITCOMS, INC.
ET Docket No. 04-295, RM-10865, CALEA

Dear Ms. Dortch:

On behalf of SMITCOMS, INC., and pursuant to Sections 1.415 and 1.419 of the Commission's Rules, I enclose an original and four copies of the Initial Comments of said SMITCOMS to be filed in the docket of the above-captioned Further Notice of Proposed Rulemaking.

Kindly stamp and return the File Copy associated herewith, and contact the undersigned in the event there are questions.

Sincerely yours,



Curtis T. White

cc: Managing Director, SMITCOMS
Peggy Ann Brandon, Esq.

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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NOV 14 2005

Federal Communications Commission
Office of Secretary

In the Matter of)

Communications Assistance for)
Law Enforcement Act and)
Broadband Access and Services)
_____)

ET Docket No. 04-295

RM 10865

INITIAL COMMENTS OF SMITCOMS, INC.

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Its Attorneys

November 14, 2005

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SUMMARY

Sint Maarten International Telecommunications Services, Inc. (SMITCOMS) offers its comments in the above-captioned CALEA proceeding. A small telecommunications entity by any standard, and although relatively new to the global marketplace, it nonetheless recently activated its state-of-the art fiber optic submarine cable system. The Sint-Maarten – San Juan system (SMPR-1) has direct connections in FCC licensed Landing Stations in San Juan, PR in Sint Maarten, NA and, via negotiated cross-connects and IRUs, SMTICOMS provides global connectivity to its regional and international carrier customers.

As a carriers' carrier without access to the local exchange network, it submits its current operation does not subject it to CALEA obligations nor the associated "capacity" or "capability" requirements. It further submits that in the event it elects to extend its network to the local loop – as recently authorized by the Telecommunications Regulatory Board in Puerto Rico – it should be eligible for exemption from CALEA notwithstanding that one of the authorized services is voice over internet protocol (VoIP) backhaul for its carrier customers. It shows in its comments below that such an exemption is consistent with the statutory dictates and legislative intent of CALEA since such an exemption does not diminish the ability of law enforcement authorities to conduct electronic surveillance envisioned or otherwise authorized. In contradistinction, it shows that an enlarged CALEA framework that requires it, a small carriers' carrier, to become CALEA compliant is unwarranted, inimical to the touchstone principle of maximizing competition, and inconsistent with the Regulatory Flexibility Act.

Through its comments below, SMITCOMS also offers its recommendations regarding classes of carriers it urges the Commission to consider eligible for exemption, in addition to its view that the Commission is clearly authorized to grant such exemptions consistent with the dictates of CALEA . Finally, it submits that the Commission can properly satisfy its “consultation” requirement with the Department of Justice in a manner similar to procedures it now employs in Section 271 application proceedings, and, further, that it is appropriate for the Commission to adopt rules governing exemption to CALEA as part of this proceeding.

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Law Enforcement Act and)	
Broadband Access and Services)	RM 10865
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INITIAL COMMENTS OF SMITCOMS, INC.

Sint Maarten International Telecommunications Services, Inc. (SMITCOMS), through counsel and pursuant to Sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§ 1.415, 1.419, hereby submits its Initial Comments in response to the Commission's Order of September 23, 2005,¹ which expands the applicability of the Communications Assistance for Law Enforcement Act (CALEA) to additional services and carriers. Through an accompanying *Further Notice of Proposed Rulemaking (FNPRM)*,² the Commission initiated a further proceeding and requested comment on, among others, the question of whether there should be a further extension of CALEA applicability. SMITCOMS respectfully offers its comments in response to the Commission's request.

¹ *Communications Assistance for Law Enforcement Act and Broadband Access and Services*, First Report and Order and Further Notice of Proposed Rulemaking, ET Docket No. 04-295, FCC 05-153 (rel. Sept. 23, 2005) [hereinafter *First Report and Order*].

² 70 Fed. Reg. 59,704 (Oct. 13, 2005) (to be codified at 47 C.F.R. pt. 64).

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1. The Interest of SMITCOMS In This Proceeding

SMITCOMS is a U.S. licensed carrier³ and the wholly-owned subsidiary of SMITCOMS, NV, a company organized under and operating pursuant to the laws of the Netherlands Antilles. Although relatively new to the global marketplace, SMITCOMS has made significant strides towards its goal of maximizing competition in its targeted marketplace. Established in 2000, the company continues to remain a small operator in terms of revenues and employees, but has been able to recently activate its FCC licensed, state-of-the art SMPR-1 fiber optic cable system. This repeaterless submarine cable commenced service with a capacity of 2.5 Gbts. – with expandable capacity up to 10 Gbts. – and has direct connections with Landing Stations in San Juan, PR and Sint Maarten, Netherlands Antilles; it also has IRU interconnectivity with various operators and carriers that provide the company with global connectivity to serve its regional and international carrier customers.

Of particular significance to this proceeding, SMITCOMS also was recently issued a license by the Telecommunications Regulatory Board of Puerto Rico which authorizes it to land and operate switched facilities in the local loop.⁴ Once operational, these facilities will provide backhaul transit and routing services for telecommunications carriers providing local exchange and termination services in the local loop.

³ SMITCOMS holds FCC licenses as a 214 facilities-based provider as a Cable Landing Station operator. See *Public Notice*, Report TEL00689, August 7, 2004, File No. ITC-214-20030702-00319; *Public Notice*, TEL-00787, May 6, 2004, File No. SCL-LIC-20031209-00033, ITC-214-20040128-00071.

⁴ See *RESOLUCIÓN Y ORDEN*, Caso Num. JRT-2004-CER-0008, Junta Reglamentadora de Telecomunicaciones de Puerto Rico, September 29, 2004; see also Ltr. of Miguel Reyes Davilá, President de Junta Reglamentadora to Curtis White, Esq., October 15, 2005.

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Traffic for the company's carrier customers will include hand-off voice over internet protocol (VoIP) as well as other forms of internet data. The subject telecom license also permits SMITCOMS to contract for or provide wholesale transport to retail providers in the local loop.⁵

The expanded definition of a telecommunications carrier under CALEA and, perhaps, a further possible expansion prompts SMITCOMS to offer its views, as follows:

2. SMITCOMS Is Not Currently Required To Be CALEA Compliant

It should be noted at the outset that SMITCOMS acknowledges the need for and voices its agreement with the general premise that law enforcement be permitted to engage in electronic surveillance to protect security and safety. At the same time, however, it believes its present operations and networks are not subject to CALEA applicability nor the obligations required under the CALEA Act.

In its *First Report and Order* the Commission expanded the framework for CALEA as well as the scope of its applicability.⁶ In addition, it made clear that, based on its analysis, the definition of a telecommunications carrier for purposes of CALEA was not limited to the traditional meaning of a carrier under the Communications Act.⁷ In doing so, it set out the basic elements it intends to employ to determine whether a person or entity is a carrier subject to CALEA obligations, viz: (1) facilities-based

⁵ *Id.*

⁶ *E.g., First Report and Order.*

⁷ Communications Act of 1934, as amended by Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56.

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providers of any type of broadband Internet service; (2) “managed” VoIP services; (3) whether the wire or electronic communications switching or transmission service being provided is a replacement for a substantial portion (SRP) of the local telephone exchange; and (4) whether it is in the public interest to deem such entity a telecommunications carrier under CALEA.⁸

SMITCOMS’ interpretation of the foregoing definition leads it to conclude that its current operations are not subject to CALEA requirements in that: (1) it does not currently provide switching or transmission service inside the local exchange service area either through its SMPR-1 cable or through any existing IRU but, rather, provides only backhaul transit to and from international gateways; nor (2) the backhaul service it provides does not replace any portion of the local exchange.⁹

3. SMITCOMS Planned Expansion Into the Local Loop
Should Not Require It To Become CALEA Compliant

SMITCOMS submits that the placement of its switching facilities in the local loop to provide backhaul transport for carrier customers, even though the transited traffic will encompass VoIP and other internet data, should not pull it within the ambit of CALEA. Moreover, and in the event the Commission determines otherwise, SMITCOMS further submits that it should qualify for exemption.

⁸ *First Report and Order* at 5-8, ¶¶ 7 – 14.

⁹ As two criterion set out above are not met in view of SMITCOMS operations and services at U.S. shores (Landing Stations), we offer no analysis of the public interest question in this regard. Notwithstanding, and as discussed more fully below, it is SMITCOMS view that – in the event the Commission determines it subject to CALEA under a plan to place switching facilities in the local exchange – it is in the public interest to find it is or should be exempt from CALEA obligations.

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(a) The FCC Has The Authority To Grant Exemptions Under CALEA

The Commission correctly observes that Section 102(8)(C)(ii) of the CALEA Act authorizes it to exclude "any class or category of telecommunications carriers that the Commission exempts by rule after consultation with the Attorney General."¹⁰ Although the Commission has not previously carved out or granted exemptions under CALEA,¹¹ the legislative history does set forth a framework of considerations to guide the Commission should it elect to do so.

More specifically, the legislative history makes clear the Commission may consider exempting a carrier where, based on its findings, it promotes competition or is otherwise in furtherance of the public interest.¹² SMITCOMS notes that such a clear unrestricted statement of statutory intent is also instructive on the question of whether the Commission is empowered to carve out *classes* of exemption consistent with the public interest. Indeed, guided by the ordinary meaning of the words and the threshold considerations of statutory interpretation, SMITCOMS submits the FCC is clearly authorized under the Act to create exemptions – including, we submit, classes of exemptions – it believes consistent with the dictates of the Act and in the public interest.

¹⁰ *Communications Assistance for Law Enforcement Act and Broadband Access and Services*, First Report and Order and Further Notice of Proposed Rulemaking, ET Docket No. 04-295, FCC 05-153 (rel. Sept. 23, 2005) [hereinafter *FNPRM*] ¶ 50.

¹¹ *Id.*

¹² H.R. Rep. No. 103-827, pt.1 at 22 (1994).

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The Commission is therefore urged to consider, minimally, four criteria (whether collectively or alternatively) for creating exceptions to CALEA, viz: size of the carrier; nature of service (i.e., carriers' carrier v. retail local loop); market power of the carrier; and the broader public interest considerations.

(b) Small Carriers Should Be Granted Exemption From CALEA Obligations

The Commission has provided substantial record evidence of what constitutes a small carrier under various categories of telecom providers as part of its findings required by the Regulatory Flexibility Act of 1980.¹³ On the other hand, however, neither it nor the Small Business Administration has developed a small business size standard for Competitive Access Providers (CAP).¹⁴ However, if it structured a size standard consistent with that for Wired Telecommunications Carriers, the Commission notes that a small business would be an entity that has 1,500 or fewer employees.¹⁵ Of all 769 companies falling into the categories of CAP, competitive local exchange carrier, Shared-Tenant Service Providers, or other local service providers, the Commission states that 93 have more than 1,500 employees, while 676 of the CAPs and CLECs have fewer and 1,500 employees.¹⁶

¹³ See 5 U.S.C. § 603, amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, title II, 110 Stat. 857 (1996) [hereinafter Regulatory Flexibility Act].

¹⁴ See *First Report and Order*, Appendix C ¶ 11.

¹⁵ *Id.*

¹⁶ *Id.*

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The record is silent on the average size of entities that fall below the 1,500 employee threshold, however, for the record, SMITCOMS total employee base comprises less than two (2%) of the number of employees that would be classified as a "small entity" if the Wired Telecom Carrier standard (1,500 employees) were applied. For such a small company, the cost of ensuring CALEA compliance may be prohibitively expensive¹⁷ and, in the final analysis, cause it to seriously consider curtailing its market expansion plans and opportunities, all of which are designed to promote competition.

Accordingly, SMITCOMS submits it is thus appropriate for the Commission to create a CALEA exemption based on the size of the telecom carrier, and urges that it do so based on its experience and in a manner it determines to be consistent with the public interest. By any standard the Commission may ultimately develop, SMITCOMS is confident its present size will qualify it for exemption.

(c) A Small Carriers' Carrier Should Be Granted Exemption

In expanding the framework, the Commission explained that at the time of the passage of CALEA, "...the legacy local telephone exchange network served two distinct purposes....: it provided POTS, which enabled customers to make telephone calls to other customers within a defined local service area; and it was the primary, if not the only, conduit (i.e., transmission facility) used to access many non local exchange services such

¹⁷ Primary equipment suppliers have been requested to review the Capacity and Capability requirements in light of the equipment SMITCOMS will require in the event it proceeds with its license and authority to provide VoIP and leased line services in Puerto Rico for its carrier customers, as well as wholesale broadband Internet service. That data will be subsequently provided the Commission in a follow-up filing.

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as long distance services, enhanced services, and the Internet”.¹⁸ It also noted that “...Congress intended CALEA to cover both the ability to ‘make, receive and direct calls’ (i.e., the POTS functionality) and the transmission facilities that provide access to other services (i.e., the access conduit functionality).”¹⁹

As set out in its description,²⁰ SMITCOMS business model (and in actual operation) is that of a carriers’ carrier (*i.e.*, it focuses on providing state-of-the art broadband carriage for other licensed local exchange (LEC) and interexchange carriers (IXC)). Indeed, the Company’s parent does not directly offer any local loop services in its core business market of Sint Maarten, NA,²¹ and its switching facilities now located in Puerto Rico and Miami are limited strictly to the provisioning of inbound/outbound backhaul and gateway connections. As a result, connections to its broadband system (and its switching facilities) are made by carriers providing services directly to the end-user, and carriers also seeking the most competitive rates for moving their traffic between point(s) of origination and termination. Accordingly, and in view of the fact that its system does not permit direct access to the PSTN and, as well, does not provide the ability to “make, receive and direct calls” except through a licensed CLEC or ILEC, we submit that SMITCOMS’ present operation does not pull it within the meaning of a telecommunications carrier for purposes of CALEA.

¹⁸ See *First Report and Order* at 7, ¶ 13.

¹⁹ *Id.* at 5, ¶ 11.

²⁰ *Supra* at 2.

²¹ SMITCOMS is governmentally owned, and the Sint Maarten Government owns other companies that provide wireless, local loop and internet services, however, all are separate and have independent boards.

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Once SMITCOMS places its switching facilities in the local loop, its operations will continue to emphasize its present business model of serving as a carriers' carrier. Thus, while it may have located switching facilities in the local loop, it will continue to pursue carrier customers. As such, users in the PSTN will generally not have access to the SMITCOMS network except through other carriers. In addition, although no decision has been made, the company's license in Puerto Rico also authorizes it to provide leased lines for wholesale capacity purposes. In the event SMITCOMS elects to pursue that opportunity, it will remain a fact that the overwhelming majority of users connected to the PSTN will not be able to connect to its network except through other carriers.

SMITCOMS submits that requiring it to undergo the expense of ensuring it is CALEA compliant – particularly in view of the fact that law enforcement will already have ready access to all end users via access granted them by SMITCOMS' carrier customers providing direct services to PSTN end-users – will create a significant and unwarranted impact. Because such a requirement would be inconsistent with the dictates of the Regulatory Flexibility Act, small companies providing services as a carriers' carrier should be exempt from CALEA obligations.

(d) A Carrier With Limited Market Power Should Be Granted Exemption

Assuming *arguendo* the Commission determines the service SMITCOMS' will provide in the local exchange to be subject to CALEA, we submit that Commission should nonetheless exempt the company given its total lack of market power.

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As demonstrated above, SMITCOMS has one existing cable facility that connects directly to two U.S. gateways (Puerto Rico and Miami, FL), and it does so at FCC licensed Landing Stations or facilities. Its switching facilities are cross-connected at both locations to other long-haul carriers. It is the most recent and indisputably smallest carrier at both facilities. To the extent it succeeds in expanding its reach into a co-located facility in Puerto Rico, or perhaps some other local exchange in the U.S., it likely will retain the same distinctions it currently has at present, namely: the most recent and indisputably smallest carrier in the facility. Moreover, its primary service will be to serve as a carriers' carrier, augmented by wholesale leased lines. Its leased facilities will link back into its SMPR-1 cable for transit to other parts of the global community.

SMITCOMS submits that once it expands into a local exchange area, the company's presence in the market for the foreseeable future can only be described as small. Indeed, it is almost beyond conception that the company will capture any appreciable portion of the competitive access market. As such, its service could not possibly serve as "a replacement for a substantial portion of the local telephone exchange service" even when viewed under the Commission's second element of consideration for SRP, namely: replacement of any significant part of an individual subscriber's functionality previously provided via circuit-switched local telephone exchange service.²²

(e) Public Interest Supports A Decision To Exempt

A touchstone principle interwoven throughout the FCC's regulatory landscape is the promotion of competition that inures to the benefit of the consumer. Competition

²² E.g., *First Report and Order* at 6, ¶ 12.

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is precisely what has driven SMITCOMS – notwithstanding its size and lack of market power – to incur millions of dollars in capital costs to install and operate submarine cable systems that interconnect to the global marketplace. Competition also has driven it to seek and obtain authority to locate switching facilities in the local loop in order to expand its access to its carrier customer base. That expanded access is projected to reduce overall carrier costs which, in turn, should spur greater price competition by and among carriers providing retail services to the consuming public. To now require it to undertake prohibitively expensive investments to ensure CALEA compliance capability is counter-productive to well-settled policy; in addition, it is inimical to the principle of maximizing competition in the telecommunications marketplace. It also is wholly unnecessary given the fact that its carrier customers have (or will have) the capacity and capability to provide law enforcement the access envisioned under CALEA that is necessary to protect the public. Accordingly, and to the extent the Commission's expanded framework is determined to apply to SMITCOMS, we urge the Commission to find it is in the public interest to exempt the company from obligations required under CALEA Act.

4. Addressing The “By Rule” And “Consultation” Provisions Regarding Any Determination By The FCC To Adopt Exemptions Under CALEA

As discussed above,²³ the Commission correctly observes that it has the authority to grant exemptions “...from CALEA for entities that would otherwise fall within the

²³ *Supra* at 5.

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definition of ‘telecommunications carrier’ for purposes of requiring CALEA compliance”, citing in support thereof Section 102(8)(C)(ii) of the CALEA Act.²⁴ It further states that it has not previously granted any exemptions under that authority, nor has it adopted specific procedures for doing so.²⁵ In view of these facts, it particularly requests comments on how the phrase “by rule” should be interpreted vis-à-vis any decision to adopt exemptions to certain carriers under CALEA.

It should be noted here that the Department of Justice (DOJ), in earlier filings in this Docket, recognized and expressed a willingness to evaluate requests for exemption.²⁶ In this regard, DOJ indicates that a party may wish to consider articulating well-defined category of institutions, services and/or that may merit exemption. SMITCOMS submits that its foregoing comments represent well-defined reasoning in support of its proposition that the Commission should consider exempting certain categories of entities that may otherwise be required to come into CALEA compliance, viz: small carriers as the Commission may so define, small carriers’ carriers, carriers with limited market power (under benchmark thresholds determined by the Commission) and, further, it may grant categories of exemption under public interest considerations so long as it determines such exemptions are consistent with statutory dictates.

In the event the Commission determines it appropriate to define categories of exemption – and SMITCOMS strongly urges it to do so – such a determination will

²⁴ See *FNPRM* at 26, ¶ 50.

²⁵ See *id.*

²⁶ E.g., *id.* at n.144.

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require “consultation with the Attorney General”.²⁷

The *FNPRM* provides various examples where the Commission has implemented statutory provisions that require consultations with the Attorney General.²⁸ It states, for example, that it consults in licensing matters that involve an approval or denial of Section 271 applications under the Act.²⁹ In this regard, such “consultation” permits the Attorney General to evaluate such applications under “any standard the Attorney General considers appropriate,” whereupon the Commission is then required to “give substantial weight to the Attorney’s General’s evaluation.”³⁰ There the Commission deems the “consultation” requirement met through the filing of comments by the Attorney General in pending 271 application matters. Such a procedure has worked in 271 application proceedings, and there is no basis to suggest that it will prove any less effective in protecting the public interest in matters involving CALEA regarding any exemption(s) the Commission may determine consistent with the legislative intent of the CALEA Act.

Finally, SMITCOMS submits it is appropriate to undertake the implementation of such a policy and rule in a properly noticed-out *FNPRM*, such as this instant proceeding.

5. Greater Flexibility Is Required In Order To Achieve Compliance

The Commission appropriately recognizes that, to the extent smaller entities are not granted exemption, there must be flexibility built into the compliance requirements,

²⁷ See *id.* at 26 – 27.

²⁸ 47 U.S.C. § 271(D)(2)(A).

²⁹ See *id.* at n.149.

³⁰ *Id.*

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and one which takes into account the limited resources of smaller entities.³¹ The Regulatory Flexibility Act mandates no less.³² While no specific time period is proposed as part of its recommendation, SMITCOMS notes that the Commission must ensure that the time extension provided is reasonable and, further, does not impose unreasonable or disproportionate burdens upon smaller companies.

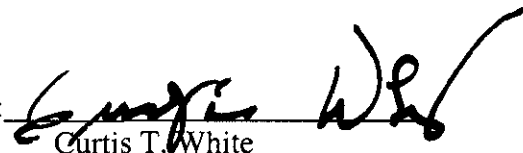
Conclusion

SMITCOMS urges the Commission to exercise the authority and discretion granted it under CALEA and establish, by rule, classes of CALEA exemptions consistent with the public interest. In doing so, and as hereinbefore discussed, SMITCOMS urges the Commission to consider exemptions for certain "small business" carriers; carriers with a carriers' carrier business operation; carriers with limited power in the marketplace; and, based upon other appropriate factors, in furtherance of the public interest standard.

Respectfully submitted,

SMITCOMS, INC

By:



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³¹ *E.g., id.*, Part IV at 26, ¶ 49.

³² *E.g., 5 U.S.C. §601 et seq.*